

STATE OF MICHIGAN  
COURT OF APPEALS

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BRIAN JOHN DOWELL and KELLY DOWELL,

Plaintiffs-Appellants,

v

BARBARA ANN MARSACK,

Defendant-Appellee.

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UNPUBLISHED

May 22, 2007

No. 274532

Macomb Circuit Court

LC No. 2005-003918-NH

Before: Cooper, P.J., and Murphy and Neff, JJ.

PER CURIAM.

In this action to recover noneconomic damages from a third party under the no-fault act, plaintiffs appeal as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiffs challenge the trial court's determination that plaintiff John Dowell's injuries did not meet the serious impairment of body function threshold under MCL 500.3135(7).<sup>1</sup> We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, a Chesterfield Township police officer, suffered injuries to his leg and knee when he was struck by defendant's car while he was directing traffic at an intersection on October 31, 2003. The trial court agreed that plaintiff sustained an objectively manifested impairment of an important body function, but concluded that his ability to generally lead his normal life was not affected. Accordingly, the court granted defendant's motion for summary disposition.

We review de novo a trial court's decision on a motion for summary disposition. *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). When ruling on a motion brought under MCR 2.116(C)(10), the trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Reed*,

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<sup>1</sup> Because plaintiff Kelly Dowell's loss of consortium claim is derivative of John Dowell's claim, the singular term "plaintiff" is used to refer to John Dowell.

*supra*. “The moving party is entitled to judgment as a matter of law if the proffered evidence fails to establish a genuine issue of any material fact.” *Id.*

Under the no-fault act, MCL 500.3101 *et seq.*, tort liability for noneconomic losses is generally limited to instances in which the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. MCL 500.3135(1); *Hardy v Oakland Co*, 461 Mich 561, 565; 607 NW2d 718 (2000). MCL 500.3135(1) provides:

A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

MCL 500.3135(7) defines “serious impairment of body function” as

an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.

The question whether a plaintiff has satisfied this statutory threshold is a question of law for the court if there is no factual dispute concerning the nature and extent of the person’s injuries, or there is a factual dispute, but the dispute is not material to the determination. MCL 500.3135(2)(a)(i) and (ii).

In *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), our Supreme Court addressed the “serious impairment of a body function” threshold. The Court held that an injury does not generally affect a person’s ability to lead a normal life unless the objectively manifested impairment of an important body function affects the *course* of the person’s life. *Id.* at 130-131. The Court stated:

Accordingly, the effect of the impairment on the course of a plaintiff’s entire normal life must be considered. Although some aspects of a plaintiff’s entire normal life may be interrupted by the impairment, if, despite those impingements, the course or trajectory of the plaintiff’s normal life has not been affected, then the plaintiff’s “general ability” to lead his normal life has not been affected and he does not meet the “serious impairment of body function” threshold. [*Id.* at 131.]

The Court further explained:

In determining whether the course of the plaintiff’s normal life has been affected, a court should engage in a multifaceted inquiry, comparing the plaintiff’s life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff’s overall life. Once this is identified, the court must engage in an objective analysis regarding whether any difference between the plaintiff’s pre- and post-accident lifestyle has actually affected the plaintiff’s “general ability” to conduct the course of his life. Merely “any effect” on the plaintiff’s life is insufficient because a de minimus effect

would not, as objectively viewed, affect the plaintiff's "general ability" to lead his life.

The following nonexhaustive list of objective factors may be of assistance in evaluating whether the plaintiff's "general ability" to conduct the course of his normal life has been affected: (a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery. [*Id.* at 132-133 (footnotes omitted).]

*Kreiner* instructs that none of the individual factors are intended to be dispositive by themselves. *Id.* at 133-134. "For example, that the duration of the impairment is short does not necessarily preclude a finding of a 'serious impairment of body function.'" *Id.* at 134. To determine whether one has suffered a "serious impairment of body function," the totality of the circumstances must be considered, and the ultimate question is whether the impairment "affects the person's general ability to conduct the course of his or her normal life." *Id.* at 134. The medical record and the deposition testimony support a conclusion that plaintiff's injuries from the accident have affected his general, overall ability to lead his preaccident life, given the totality of the circumstances in this case. *Id.* at 134-135.

Plaintiff was struck from behind by defendant's car as defendant proceeded through the intersection where plaintiff was directing traffic on the evening of October 31, 2003. The impact caused plaintiff to fly into and shatter the windshield of defendant's car and dented the hood of the car. The medical records presented to the court established that plaintiff sustained compound comminuted fractures of the tibia plateau and fibula of his left leg as a result of the collision, and irreversible damage to his left perineal nerve, causing permanent numbness on the left side of his left foot. Plaintiff had reconstructive knee surgery, was off work for several months, and then returned to work on a restricted basis, but could not resume his previous duties as a detective and patrol officer. According to plaintiff, his surgery required drilling into the tibia and the insertion of 4-inch long surgical screws and surgical nails to stabilize the fracture.

Plaintiff eventually returned to unrestricted duty, but cannot undertake his prior activities as a police officer because of problems with his left knee and foot. Plaintiff suffers numbness in his left foot, which precludes him from resuming his pre-accident law enforcement routines. Plaintiff's impairment is likely permanent. Plaintiff's physician predicted that the natural history of plaintiff's types of injuries lend itself to posttraumatic arthritis. Consequently, in the future plaintiff may need pain-relieving injections, physical therapy, total knee arthroplasty.

Given "the seriousness of the initial injury, the treatment required, and the duration of disability," plaintiff sustained a serious impairment of body function. *Kern v Blethen-Coluni*, 240 Mich App 333, 343; 612 NW2d 838 (2000). While certain limitations might not rise to the level of a serious impairment for some people, they may for others depending on that person's life context, even if the impairment itself is of short duration and the person has no physician-imposed restrictions on activity. *Williams v Medukas*, 266 Mich App 505, 508-509; 702 NW2d 667 (2005). In *Williams*, this Court found a serious impairment of body function after the plaintiff suffered a fractured right shoulder and a fractured left hand, making his arms useless for one month, even though he returned to work and his coaching position three months after the accident with no restrictions, because he was nevertheless precluded from demonstrating

basketball shots in coaching students and could no longer golf, which he had avidly pursued before the accident. *Id.* at 506-507, 509.

Although plaintiff worked as a detective at the time of the accident and worked overtime hours as a patrol officer, he is unable to return to his normal duties despite his unrestricted duty status. He suffers from pain and instability in his left knee and foot, which requires a conscious effort to insure his footing in every step, and therefore jeopardizes his ability to focus on his response as a police officer in handling prisoners and others. Plaintiff testified: “It’s a constant battle of paying attention to what I have to do and my knee at the same time.” As a detective, plaintiff would previously have to run from several times a week to 2 or 3 times a month, but stated that he did not believe that he could chase someone down now. Additionally, plaintiff has necessarily curtailed other pre-accident physical activities that he engaged in, including recreational sports and volunteer activity with the St. Clair County Sheriff’s Department dive team, carpentry, and construction on his home and in his workshop.

Generally, self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish the extent of a residual impairment. *Kreiner, supra* at 133 n 17. However, “[w]here there is evidence that the physician has pinpointed a physiological basis for the pain or believes that the patient is truly suffering pain, such evidence, while not conclusive, lends support to a conclusion that instructions by the physician constitute physician-imposed restrictions.” *McDaniel v Hemker*, 268 Mich App 269, 284-285; 707 NW2d 211 (2005) (footnote omitted). Here, plaintiff’s medical examination record supports his indicated limitations on activity and further states that x-rays show some progressive degenerative changes compared to his previous x-rays.

In assessing whether the course of one’s normal life has been affected, a court should compare the individual’s lifestyle before and after the injury. *Kreiner* at 132-133. To disregard the extent of plaintiff’s impairment, and its permanent effect on plaintiff’s work and life, is contrary to the standard in *Kreiner*. We agree with plaintiff that the nature and extent of his injuries do not lend themselves to a judicially resolved question whether plaintiff suffered a serious impairment of body function.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper

/s/ Janet T. Neff